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Court of Appeals Clarifies Definition of "The Same Cause of Action" for Purposes of Claim Preclusion

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DEVELOPMENTS IN NEW YORK LAW

Court of Appeals clarifies definition of "the same cause of action" for purposes of claim preclusion

Claim preclusion, an aspect of res judicata,[267] forecloses relitigation of matters which have been or which could have been litigated in a prior adjudication when a subsequent suit is based on the same cause of action.[268] What constitutes the same cause of action for claim preclusion purposes, however, is not always clear.[269] Recently,

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Procedure Law and other statues [do not sanction] a general remission of the Tax Law's call for secrecy merely to accomodate a grand jury subpoena . . . where there is a total absence of any showing . . . that the investigation bears some relationship to tax matters." *Id.* (citation omitted).

[267] The term res judicata often is used broadly to include all instances in which a party is precluded from relitigating matters involved in prior adjudications. D. SIEGEL, NEW YORK PRACTICE § 442 (1978); *accord,* RESTATEMENT (SECOND) OF JUDGMENTS, Introductory Note ch. 3 (Tent. Draft No. 1, 1973). Used in this manner, the concept encompasses both "claim preclusion" and "issue preclusion." *See* SIEGEL, *supra,* §§ 442-443, 450.

Claim preclusion prevents relitigation of an entire cause of action if a final and binding judgment previously has been rendered on the same matter. This doctrine is comprised of two subcategories: merger and bar. Under the merger rule, when judgment is rendered in favor of the plaintiff, "his cause of action 'merges' in the judgment" and may not be relitigated. Conversely, if the defendant has judgment in an action, the plaintiff thereafter is 'barred' from relitigating the same cause of action. SIEGEL, *supra,* § 450; *accord,* RESTATEMENT (SECOND) OF JUDGMENTS §§ 45, 47-48, 61 (Tent. Draft No. 1, 1973). For a discussion of special circumstances, such as "dismissal for lack of jurisdiction," when merger and bar will not operate to preclude a subsequent suit on the same cause of action, see *id.* §§ 48.1, 61.2.

In contrast, issue preclusion operates to foreclose relitigation of specific questions of fact or law that were actually or implicitly resolved in an earlier adjudication. Statter v. Statter, 2 N.Y.2d 668, 672-73, 143 N.E.2d 10, 12, 163 N.Y.S.2d 13, 16-17 (1957); Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929); SIEGEL, *supra,* §§ 457, 460. This doctrine may not be raised, however, against a party who did not have a full and fair opportunity to litigate the issue in a prior action. *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969); RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977). Like claim preclusion, issue preclusion has two aspects. One aspect, collateral estoppel, precludes relitigation in subsequent suits of issues that previously were determined in a suit based on a different cause of action. SIEGEL, *supra,* § 457; RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment b (Tent. Draft No. 4, 1977); *see In re* American Ins. Co., 43 N.Y.2d 184, 189 n.2, 371 N.E.2d 798, 801 n.2, 401 N.Y.S.2d 36, 39 n.2 (1977); Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929). Direct estoppel, on the other hand, precludes relitigation of issues determined in a proceeding which was dismissed on grounds other than the merits. SIEGEL, *supra,* § 443. For an excellent discussion of the distinctions between issue preclusion and claim preclusion, see Rosenberg, *Collateral Estoppel in New York,* 44 ST. JOHN'S L. REV. 165 (1969).

[268] Rosenberg, *supra* note 267, at 166-67; SIEGEL, *supra* note 267, § 442, at 585, § 445 at 591-92; *see* Cromwell v. County of Sac., 94 U.S. 351, 352 (1876); Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929).

[269] *See* Smith v. Kirkpatrick, 305 N.Y. 66, 70, 111 N.E.2d 209, 211 (1953); F. JAMES, CIVIL PROCEDURE § 11.10 at 554 (1965); A. VESTAL, RES JUDICATA/PRECLUSION V-43 (1969); Rosenberg, *supra* note 267, at 168. According to one commentator:

in *Reilly v. Reid*,[270] the Court of Appeals held that, where the remedy sought and the facts necessary to support a claim are the same as those determined in an earlier adjudication, the proceedings are based on the same cause of action for res judicata purposes.[271]

The *Reilly* petitioner was employed as an attorney in the competitive class of the civil service.[272] After his position was abolished, the petitioner brought an article 78 proceeding,[273] contending that under the Civil Service Law he was entitled to be appointed to the same or a similar position in the noncompetitive or exempt civil service class.[274] This proceeding ultimately was dismissed on the ground that the positions sought were not similar to the petitioner's former position as a matter of law.[275] Prior to this dismissal, however, the petitioner instituted a second proceeding in which he sought reinstatement to his former job, arguing that the elimination of the position was illegal.[276] The respondents unsuccessfully moved for dismissal, contending that the proceeding was barred on res

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> The definitions of "cause of action" [for purposes of the res judicata doctrine] for the most part fall into one of three main patterns: (1) Those which define it in terms of the remedial right which is being enforced and limit it to a single right . . . . (2) Those which define "cause of action" in terms of a single delict or breach of a primary duty . . . . (3) Those which give the term "cause of action" a purely factual content . . . .

JAMES, *supra* § 11.10, at 553 (footnotes omitted). *See generally* Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 340 (1948); 65 HARV. L. REV. 820, 824-25 (1952).

[270] 45 N.Y.2d 24, 379 N.E.2d 172, 407 N.Y.S.2d 645 (1978), *aff'g* 58 App. Div. 2d 926, 397 N.Y.S.2d 429 (3d Dep't 1977) (mem.).

[271] 45 N.Y.2d at 30, 379 N.E.2d at 176, 407 N.Y.S.2d at 648-49.

[272] *Id.* at 26, 379 N.E.2d at 174, 407 N.Y.S.2d at 646. Petitioner Reilly had been employed as an associate attorney with the New York State Department of Environmental Conservation. *Id.*, 379 N.E.2d at 173, 407 N.Y.S.2d at 646.

The classified civil service is comprised of four classes: competitive, noncompetitive, exempt, and labor. Appointments generally are made to competitive positions on the basis of examinations. *See* Meenagh v. Dewey, 286 N.Y. 292, 304, 36 N.E.2d 211, 216 (1941); Ottinger v. Civil Serv. Comm'n, 240 N.Y. 435, 442-43, 148 N.E. 627, 629 (1925); N.Y. CIV. SERV. LAW, Rules & Regs. §§ 2.1-2.2 (McKinney 1973).

[273] Article 78 of the CPLR defines the scope of judicial review of administrative agency decisions and establishes the procedural mechanism for bringing a proceeding for review. For a general discussion of article 78, see SIEGEL, *supra* note 267, §§ 557-570.

[274] 45 N.Y.2d at 26-27, 379 N.E.2d at 173, 407 N.Y.S.2d at 646-47. After the elimination of his position, the petitioner was offered a job at a lower grade level within the competitive class. *See* N.Y. CIV. SERV. LAW § 80 (McKinney 1973). He rejected this offer, however, electing instead to bring suit.

[275] Reilly v. Reid, 55 App. Div. 2d 975, 390 N.Y.S.2d 655 (3d Dep't 1977).

[276] 45 N.Y.2d at 27, 379 N.E.2d at 174, 407 N.Y.S.2d at 647. In the second article 78 proceeding, the petitioner alleged that his former duties merely had been reassigned to the non-competitive or exempt positions he sought in the previous proceeding. He contended that this reassignment of duties was arbitrary and capricious, constituting an abuse of discretion. *Id.* at 27, 379 N.E.2d at 174, 407 N.Y.S.2d at 647; *see* CPLR 7803(3) (1963).

judicata grounds.[277] The Appellate Division, Third Department, reversed and granted the respondents' motion to dismiss.[278]

On appeal, the Court of Appeals affirmed, noting that in each proceeding the petitioner had predicated his claim on the same underlying factual transaction and had requested "nearly identical" relief.[279] Writing for the unanimous Court, Chief Judge Breitel rejected a strictly mechanical approach for determining when the principles of claim preclusion should be invoked.[280] The Court instead examined the factual foundation for the relief requested in each proceeding and the extent to which the purportedly distinct actions relied on similar proof.[281] Applying the criteria articulated in the Second Restatement of Judgments,[282] Chief Judge Breitel found the factual predicate in each proceeding to be the allegedly wrongful abolition of the petitioner's civil service position.[283] While material differences in the elements of proof might render distinct two actions which arose from the same course of dealings between the adversaries,[284] the *Reilly* petitioner could not benefit from such a rule, since in both proceedings he would have to "establish that abolition of his position without transferring him to an equivalent

[277] 58 App. Div. 2d at 926, 397 N.Y.S.2d at 429; *see* CPLR 3211(a)(5) (1970). The appellate division held that the second proceeding was barred on *"res judicata* and collateral estoppel" grounds since the issues involved in the second suit were "substantially the same as those previously before the court." 58 App. Div. 2d at 927, 397 N.Y.S.2d at 430.

[278] 58 App. Div. 2d at 927, 397 N.Y.S.2d at 430.

[279] 45 N.Y.2d at 26, 379 N.E.2d at 174, 407 N.Y.S.2d at 646.

[280] *Id.* at 29, 379 N.E.2d at 175-76, 407 N.Y.S.2d at 648. The Court stated that "no single definition formulation is always determinative" in assessing what constitutes the same cause of action. *Id.* at 29, 379 N.E.2d at 176, 407 N.Y.S.2d at 648. The Court suggested, however, that the categorical approach exemplified by the RESTATEMENT (SECOND) OF JUDGMENTS § 61(2) (Tent. Draft No. 1, 1973) may be useful in evaluating similarity between causes of action. 45 N.Y.2d at 29, 379 N.E.2d at 176, 407 N.Y.S.2d at 648.

[281] 45 N.Y.2d at 29-31, 379 N.E.2d at 175-77, 407 N.Y.S.2d at 648-49.

[282] *Id.* at 29-30, 379 N.E.2d at 176-77, 407 N.Y.S.2d at 648-49. The section of the Restatement quoted by the *Reilly* Court emphasizes a transactional approach and provides that the claim or cause of action extinguished by a prior judgment "includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." RESTATEMENT (SECOND) OF JUDGMENTS § 61(1) (Tent. Draft No. 1, 1973). According to the Restatement, "whether the facts are related in time, space, origin, or motivation, [and] whether they form a convenient trial unit" are particularly significant factors in "pragmatically" assessing the elements of a litigated transaction. *Id.* § 61(2) & Comment b. It should be noted that the section of the 1973 Restatement draft which defines "cause of action" for res judicata purposes was submitted in substantially the same form in 1978. *See* RESTATEMENT (SECOND) OF JUDGMENTS Foreword (Tent. Draft No. 5, 1978).

[283] 45 N.Y.2d at 30, 379 N.E.2d at 176-77, 407 N.Y.S.2d at 648.

[284] *Id.*, 379 N.E.2d at 176, 407 N.Y.S.2d at 649; *accord,* Smith v. Kirkpatrick, 305 N.Y. 66, 72, 111 N.E.2d 209, 212 (1953).

position was in violation of law."[285] In addition, the Court noted, in both suits the petitioner sought essentially the same relief—"restoration to his original duties"—although he did so by requesting a nominally different remedy under a different legal theory.[286] Thus, the *Reilly* Court found that the petitioner's two

[285] 45 N.Y.2d at 30, 379 N.E.2d at 176, 407 N.Y.S.2d at 649. The Court determined that the proof in the petitioner's second proceeding would rest upon substantially the same "foundation facts" as those presented in the earlier suit. In the first proceeding, in order to establish his right to a noncompetitive or exempt position, the petitioner would have had to prove that the duties involved in the position sought were substantially the same as those of his former position. *See* N.Y. CIV. SERV. LAW § 80 (McKinney 1973). In the second suit, in order to show that his former position had been wrongfully abolished, the petitioner also would have to demonstrate the similarity between the duties of his former job and those of the position to which his duties allegedly were reassigned. *See* Meenagh v. Dewey, 286 N.Y. 292, 298, 36 N.E.2d 211, 217 (1941). The Court contrasted the *Reilly* petitioner's situation to that of the plaintiff in Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E.2d 209 (1953), where the Court held that an action in quantum meruit was not foreclosed by the adjudication of a prior action arising from the same transaction. *Id.* at 72, 111 N.E.2d at 212. In the earlier suit, the plaintiff's claim for breach of contract was dismissed on Statute of Frauds grounds, and his joint venture theory was dismissed on the merits. *Id.* at 68-69, 111 N.E.2d at 210-11. Although in the quantum meruit action the plaintiff sought payment for the same work that was the subject of the prior suit, the proof in each action varied. In the earlier suit, the plaintiff concentrated on proving the existence of a valid agreement giving rise to a right to payment. *Id.* at 71, 111 N.E.2d at 212. In the later suit, however, the plaintiff emphasized the value of the services he had rendered without regard to any agreement. *Id.* Commenting upon the plaintiff's right to maintain the action, the *Smith* court stated:

> The two actions [joint venture and quantum meruit] involve different "rights" and "wrongs". The requisite elements of proof and hence the evidence necessary to sustain recovery vary materially. The causes of action are different and distinct and the rights and interests established by the previous adjudication will not be impaired by a recovery, if that be the outcome, in *quantum meruit.*

Id. at 72, 111 N.E.2d at 212. Thus, under the *Smith* Court's approach, claim preclusion principles will be invoked only when successive suits are predicated on the same transaction or series of transactions and the successive claims are dependent upon the same evidence. *See* Marsh v. Masterson, 101 N.Y. 401, 407, 5 N.E. 59, 61 (1886); Lipkind v. Ward, 256 App. Div. 74, 78, 8 N.Y.S.2d 832, 836-37, (3d Dep't 1939). *See also* Perry v. Dickerson, 85 N.Y. 345, 350 (1881). In *Perry,* the Court held that a suit to recover wages for services rendered was a different cause of action from a suit for damages for breach of an employment agreement since "[t]he wages could not have been proved or recovered under the pleadings in [the damage suit] nor the damages for the wrongful dismissal in [the suit for wages]." *Id.* at 350.

[286] 45 N.Y.2d at 30, 379 N.E.2d at 176, 407 N.Y.S.2d at 648-49. The Court stated that, where there is an identity in the factual predicates and proof involved in successive proceedings, variation of legal theory or remedy sought in the subsequent suit will not give rise to a distinct cause of action. *Id.* at 30, 379 N.E.2d at 176, 407 N.Y.S.2d at 649; *accord,* RESTATEMENT (SECOND) OF JUDGMENTS § 61.1 & Comment d, at 98 (Tent. Draft No. 1, 1973); *see* Gowan v. Tully, 45 N.Y.2d 32, 36, 379 N.E.2d 177, 179, 407 N.Y.S.2d 650, 652 (1978); City of Rye v. Metropolitan Transp. Auth., 24 N.Y.2d 627, 637, 249 N.E.2d 429, 433-34, 301 N.Y.S.2d 569, 575 (1969); Hahl v. Sugo, 169 N.Y. 109, 114-15, 62 N.E.2d 135, 137 (1901); Eidelberg v. Zellermayer, 5 App. Div. 2d 658, 663, 174 N.Y.S.2d 300, 304 (1st Dep't 1958), *aff'd mem.,* 6 N.Y.2d 815, 159 N.E.2d 691, 188 N.Y.S.2d 204 (1959).

causes of action were not sufficiently distinguishable for claim preclusion purposes.[287]

The *Reilly* holding is in accord with earlier New York cases which utilized tests emphasizing the nature of the wrongful act or the evidence to be presented as criteria for determining whether successive suits involved identical causes of action for res judicata purposes.[288] Significantly, however, while reaffirming the viability of

[287] 45 N.Y.2d at 30, 379 N.E.2d at 177, 407 N.Y.S.2d at 649. The *Reilly* Court noted in dictum that, under the holding of Statter v. Statter, 2 N.Y.2d 668, 143 N.E.2d 10, 163 N.Y.S.2d 13 (1957), the petitioner would be precluded from further litigating the validity of the elimination of his position, since the first proceeding, in which he sought transfer to a different civil service position, may have "necessarily assumed the validity of the abolition of the old position." 45 N.Y.2d at 31, 379 N.E.2d at 177, 407 N.Y.S.2d at 649-50. The *Statter* Court held that the existence of a former judgment precludes relitigation of issues that were actually or implicitly litigated in the action even when the second suit is premised on a different cause of action. 2 N.Y.2d at 672-73, 143 N.E.2d at 12, 163 N.Y.S.2d at 16-17. Thus, "[w]here a judgment of a particular kind can only be accounted for legally by the existence of a certain combination of findings, each of those findings will be deemed established by the judgment." SIEGEL, *supra* note 267, § 464, at 614. In *Statter*, for example, where a separation decree was granted, the parties were thereafter precluded from showing that a valid marriage never existed between them. Permitting the wife to maintain a subsequent annulment action was held impermissible because it would have undermined the original separation decree, which was predicated on the existence of a valid marriage between the parties. 2 N.Y.2d at 673, 143 N.E.2d at 13, 163 N.Y.S.2d at 17. In reaching this conclusion, the *Statter* Court invoked the "impairment" test articulated in Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929). *See* note 288 *infra*. The *Statter* Court's use of the *Schuylkill* "impairment" doctrine has been criticized. According to one commentator:

> It is curious that the wife's cause of action, based on the premise that the marriage was a *nullity*, could be found the same as a cause of action premising its *validity* . . . . The explanation for the Court's odd conclusion lies in the tangled reasoning the *Schuylkill* doctrine encourages . . . .
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> The "impairment" test [of *Schuylkill*] may be logical but it is far from reliable. The mere circumstances that failure to give conclusive effect to a matter involved in an earlier suit will permit a grossly inconsistent result in a second suit does not compel the second court to apply res judicata [as the *Smith* case demonstrates] . . . .
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> Better analysis in the *Statter* case would have recognized that since the wife's claim for annulment was different from her husband's earlier case for separation, she should not have been precluded on the issue of the validity of the marriage because that issue had gone uncontested in the husband's action.

Rosenberg, *supra* note 1, at 170-71 (footnotes omitted) (emphasis in original); *see* note 285 *supra*.

[288] New York courts have utilized various tests to determine whether the causes of action in successive suits are the same. One test is whether rights established in an earlier suit will be impaired by a different holding in a subsequent suit. Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, 307, 165 N.E. 456, 457 (1929). Under the *Schuylkill* test, the result reached in *Reilly* would likely have been the same, since the determination in the first suit, that the state was not obliged to employ Reilly in a comparable civil service position, would have been impaired by a holding in the second suit which permitted Reilly to return to his

a variety of traditional tests,[289] the Court appears to be moving toward the transactional approach recommended by the Restate-

former position. One commentator, however, has criticized the *Schuylkill* rule, noting that its test is circular because "whether 'rights or interests' . . . established by the former judgment would be 'destroyed or impaired' . . . depends in many cases on what the court now decides is the effect of the earlier judgment so far as creating rights or interests." Rosenberg, *supra* note 267, at 169. It is interesting to note that the *Schuykill* doctrine was not applied to bar the quantum meruit claim in Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E.2d 209 (1953), *see* note 285 *supra,* although a holding that the defendant owed the plaintiff money would have undermined the earlier finding that no money was owed. According to Professor Rosenberg, this retreat from the *Schuylkill* rationale was the result of the *Smith* Court's finding that the evidence material to each cause of action in *Smith* differed. Rosenberg, *supra* note 267, at 168.

Another approach used by the courts rests upon an examination of the nature of the wrongful act at issue. *See, e.g.,* De Coss v. Turner & Blanchard, Inc., 267 N.Y. 207, 196 N.E. 28 (1935); Secor v. Sturgis, 16 N.Y. 548 (1858); Stoner v. Culligan, Inc., 32 App. Div. 2d 170, 300 N.Y.S.2d 966 (3d Dep't 1969). The *Secor* Court reasoned: "The true distinction between demands or rights of action which are single and entire, and those which are several and distinct is, that the former immediately arise out of one and the same act . . . and the latter out of different acts . . . ." 16 N.Y. at 558. The "wrongful act" test is unsatisfactory, however, because it is difficult to predict which conduct the courts will determine to be the wrongful act underlying the respective causes of action. In *Reilly,* for example, the Court found a single wrongful act: the abolition of petitioner's position. *See* note 283 and accompanying text *supra.* It could be argued, however, that there was some basis for the Court to find that the petitioner's two suits arose from different acts. The initial claim in *Reilly* was based on the respondents' allegedly wrongful refusal to appoint the petitioner to a noncompetitive position after the elimination of his competitive position. The second action, on the other hand, might have been based on the wrongful abolition of the competitive position. Similarly, in *Smith,* where the Court found two different acts, *see* note 285 *supra,* it can be argued that the suits arose from the same act: failure to compensate the plaintiff for work performed. Thus, although the Court in *Reilly* reaffirmed the viability of a "wrongful act" test, it is submitted that the standard may be unreliable.

The test that appears to have been most influential in the *Reilly* decision, however, is whether the proof and evidence involved in the subsequent suit would be substantially the same as that involved in the prior suit. *See, e.g.,* Smith v. Kirkpatrick, 305 N.Y. 66, 72, 111 N.E.2d 209, 212 (1953); Lipkind v. Ward, 256 App. Div. 74, 78, 8 N.Y.S.2d 832, 836-37 (3d Dep't 1939); note 285 *supra.* The rationale in Eidelberg v. Zellermayer, 5 App. Div. 2d 658, 662, 174 N.Y.S.2d 300, 304 (1st Dep't 1958), *aff'd mem.,* 6 N.Y.2d 815, 159 N.E.2d 691, 188 N.Y.S.2d 204 (1959), represents a typical application of this test. In *Eidelberg,* a second action in joint venture was precluded by a former adjudication of the same "inceptive facts" premised on a sale agreement theory. 5 App. Div. 2d at 661, 174 N.Y.S.2d at 302. The *Eidelberg* court looked beyond the facts pertinent to the specific legal theory pleaded and analyzed the "foundation facts" in each suit. Finding them identical, the court determined that the successive suits were based on the same cause of action. Similar reasoning is apparent in the *Reilly* opinion, where the Court stressed the identity of the underlying transaction. *See generally* Rosenberg, *supra* note 267, at 168.

[289] *See* 45 N.Y.2d at 27-28, 31, 379 N.E.2d at 174-76, 407 N.Y.S.2d at 647, 649, where the *Reilly* Court reaffirmed the *Secor* and *Smith* rationales. *See* notes 17 & 23 *supra.* In addition, in *Reilly* and a companion case, Gowan v. Tully, 45 N.Y.2d 32, 36, 379 N.E.2d 177, 179, 407 N.Y.S.2d 650, 652 (1978), the Court expressly reaffirmed the validity of the *Schuylkill* doctrine. 45 N.Y.2d at 29, 379 N.E.2d at 175, 407 N.Y.S.2d at 648; *see* note 288 *supra.*

ment.[290] Borrowing from this approach, the Court in *Reilly* looked past the superficial differences in the petitioner's separately litigated claims and emphasized instead the common factual foundation necessary to support the two causes of action.[291] Although the *Reilly* opinion does not establish a clear standard,[292] it does reflect the Court's view that the concept of a "cause of action" should be realistically defined for purposes of applying the principles of res judicata.[293] Since modern procedural rules are designed to maximize a litigant's opportunity to procure relief to which he is entitled in a single adjudication,[294] a requirement that suitors present all claims premised on the same factual foundation in a single action is not unduly harsh. Moreover, in addition to promoting judicial economy, such a rule seems calculated to further the interest of all litigants in the finality of judgments.[295]

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[290] *See* note 282 *supra*. The reasoning applied in Gowan v. Tully, 45 N.Y.2d 32, 379 N.E.2d 177, 407 N.Y.S.2d 650 (1978), also is illustrative of the apparent inclination of the Court of Appeals to emphasize the nature of the underlying gravamen and foundation facts in considering the scope of a cause of action. *Accord,* Expert Elec., Inc. v. Levine, 554 F.2d 1227, 1234 (2d Cir. 1977); V.C. Vitanza Sons, Inc. v. Ross, 63 App. Div. 2d 1068, 406 N.Y.S.2d 160, 162 (3d Dep't 1978).

[291] *See* note 281 and accompanying text *supra*.

[292] According to one commentator, lack of precision is unavoidable.

> Detailed rules cannot settle [when causes of action are the same], for the factors that influence decision defy prescription. They include such complex considerations as the practical needs of administering justice conveniently and efficiently and the degree of favor or disfavor with which the law regards the type of claim made by the plaintiff.

Rosenberg, *supra* note 267, at 169 (footnote omitted).

Another commentator has suggested:

> Perhaps the time has come to . . . ask simply whether the party to be precluded had adequate opportunity to litigate the matter in the earlier proceeding and whether the matter is closely enough related to the original controversy so that judicial economy would be served by confining litigation to one proceeding. If these two conditions are satisfied, . . . preclusion will generally be neither unforeseeable nor unfair.

Currie, *Res Judicata: The Neglected Defense,* 45 U. CHI. L. REV. 317, 342 (1978) (footnotes omitted).

[293] *See* 45 N.Y.2d at 29, 379 N.E.2d at 175-76, 407 N.Y.S.2d at 648. In the future, because of the Court's focus on the factual foundation underlying a cause of action, the practitioner would be wise to plead all possible theories related to an underlying factual predicate in one action.

[294] *See, e.g.,* CPLR 104 (1970) (purpose of CPLR is to procure just and speedy determination of lawsuits); CPLR 1002 (1976) (permitting joinder of parties); CPLR 1007 (1976) (allowing impleader); CPLR 3014 (1974) (permitting hypothetical, inconsistent, and alternative pleading); D. SIEGEL, *supra* note 267, § 207. *See also* Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464, 469-70 (3d Cir. 1950), *cert. denied,* 341 U.S. 921 (1951).

[295] The concept of res judicata is premised on the principle that there must be finality

Federal venue restrictions for suits against national banks held inapplicable to third-party claims

Under federal law, a national bank may be sued in a state court in the county or city in which it is located.[296] Although the language of the applicable venue statute appears to be permissive, in *Mercantile National Bank v. Langdeau,*[297] the United States Supreme Court held that "national banks may be sued *only* in those state courts in the county where the banks are located."[298] Recently, however, in *Lazarow, Rettig & Sundel v. Castle Capital*

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in the litigation of disputes. New York State Labor Relations Bd. v. Holland Laundry, Inc., 294 N.Y. 480, 493-94, 63 N.E.2d 68, 74 (1945); *see* Weiner v. Greyhound Bus Lines, Inc., 55 App. Div. 2d 189, 191, 389 N.Y.S.2d 884, 886 (2d Dep't 1976). Such finality is considered essential for securing the rights and obligations of the parties and in preventing harrassing and vexatious relitigation of controversies. VESTAL, *supra* note 269, at V-7 to 10; *see* von Moschzisker, *Res Judicata,* 38 YALE L.J. 299, 299-300 (1929); 65 HARV. L. REV. 818, 820 (1952). Furthermore, finality of adjudications promotes consideration of judicial economy and the integrity of determinations made by courts of competent jurisdiction. VESTAL, *supra* note 269, at V-10 to 12; *see* D. SIEGEL, *supra* note 267, § 442; von Moschzisker, *supra* at 300-01. Due to these considerations, "recent years have seen a marked expansion by the courts of the doctrine of res judicata." H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 451 (5th ed. 1976).

[296] The venue provision of the National Bank Act provides in pertinent part that "[s]uits . . . against any . . . [national bank] . . . may be had in any . . . State . . . court in the county or city in which said [national bank] is located." 12 U.S.C. § 94 (1976). Until recently, the meaning of the term "located" as used in § 94 had been uncertain. New York courts held that, for purposes of § 94, a bank is "located" and therefore could be sued, only in that county in which its principal office is situated. *E.g.,* Thomas v. Atlanta Nat'l Bank, 58 App. Div. 2d 1001, 396 N.Y.S.2d 946 (4th Dep't 1977) (mem.); Gregor J. Schaefer Sons, Inc. v. Watson, 26 App. Div. 2d 659, 272 N.Y.S.2d 790 (2d Dep't 1966); Stephen-Leedom Carpet Co. v. Republic Nat'l Bank of Dallas, 25 App. Div. 2d 645, 268 N.Y.S.2d 377 (1st Dep't 1966) (mem.). Courts in other jurisdictions, however, held that a national bank is "located" in any county in which it operates a branch office. *E.g.,* Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., N.A., 281 N.C. 525, 189 S.E.2d 266 (1972); Holson v. Gosnell, 264 S.C. 619, 216 S.E.2d 539 (1975), *cert. denied,* 423 U.S. 1048 (1976). The issue was resolved in Citizens & S. Nat'l Bank v. Bougas, 434 U.S. 35, 45 (1977), wherein the United States Supreme Court adopted the latter position. For a critical discussion of the *Citizens* decision, see Steinberg, Citizens & Southern National Bank v. Bougas—*Achieving Justice Under the Venue Provisions of the National Bank Act,* 12 GA. L. REV. 161, 170-73 (1978).

[297] 371 U.S. 555 (1963).

[298] *Id.* at 561 (emphasis added). The Supreme Court has recognized only two exceptions to the general rule precluding suits against national banks in forums other than those in counties in which the bank is "located." In Casey v. Adams, 102 U.S. 66, 67 (1880), the Court held that purely "local" actions may be brought in counties other than those specified in § 94. In addition, the Court has stated that the venue privilege may be waived by a failure to assert it, Charlotte Nat'l Bank v. Morgan, 132 U.S. 141, 145 (1889), or by conduct which could be construed as consent to be sued, National Bank of N. America v. Associates of Obstetrics and Female Surgery, Inc., 425 U.S. 460 (1976) (per curiam). Conduct sufficient to constitute consent appears to be limited to on-going business activity within the jurisdiction, including qualifying to do business or appointing an agent to receive service of process in a foreign district. *Id.* at 462 (Rehnquist, J., concurring).